Filed 10/14/15 P. v. Morales CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ALFREDO VALDEZ MORALES,

Defendant and Appellant.

F068207

(Super. Ct. No. MCR044893)

OPINION

APPEAL from a judgment of the Superior Court of Madera County. Joseph A. Soldani, Judge.

Benjamin Owens, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Alfredo Valdez Morales (defendant) of willfully inflicting corporal injury resulting in a traumatic condition upon the mother of his child, with the personal infliction of great bodily injury under circumstances involving domestic violence. (Pen. Code, §§ 273.5, subd. (a), 12022.7, subd. (e).)[1] Following a bifurcated trial, the court found defendant was previously convicted of a prior strike offense (§ 667, subds. (b)-(i)) and served a prior prison term (§ 667.5, subd. (b)). Defendant was sentenced to a total term of 14 years in prison, and ordered to pay various fees, fines, and assessments.

On appeal, we hold: (1) Admission of a deputy sheriff's opinion concerning the victim's injuries, if error, was harmless; (2) The prosecutor did not commit misconduct; (3) The trial court's response to a question from the deliberating jury did not improperly instruct jurors how to consider the evidence; (4) The Health and Safety Code section 1797.98a penalty assessment was properly imposed; but (5) The fee imposed pursuant to section 1203.097, subdivision (a)(5) was unauthorized. Accordingly, we modify the judgment by striking the latter fee, and otherwise affirm.

FACTS

I

PROSECUTION EVIDENCE

Defendant was the father of Tiffany Lozano's youngest child. Because the boy was born prematurely, he had to stay in Children's Hospital following his birth. As a result, Lozano and defendant stayed at the Ronald McDonald House in November 2012.[2]

As of the time she testified at trial, Lozano remembered only some parts of November 13. She and defendant had a verbal argument over the hospital calling their son Baby Boy Lozano rather than using defendant's surname. Later that day, defendant

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1 Further statutory references are to the Penal Code unless otherwise stated.

2 Unspecified references to dates in the statement of facts are to the year 2012.

punched her at least 10 times with his fist in her left thigh, stomach, and ribs; burned her a couple of times with a lighter; and kicked her. Lozano yelled and screamed and banged on the walls for help. She remembered people, whom she thought were police officers, coming. Sometimes she was awake during the assault; other times, she blacked out. When she woke up, she was on the floor and a paramedic was present. Lozano recalled begging defendant to stop, but he kept cussing at her and calling her a bitch and a whore and saying she deserved it. The assault stopped and started again, and lasted around 45 minutes.[3] She did not know how her forehead was injured.

On November 13, David Rodriguez was staying at the Ronald McDonald House in Madera. He called the police in response to a disturbance. Rodriguez could hear male and female voices and screaming and banging. He heard the female voice say, "Ow, stop." Rodriguez saw a man knock on the door, defendant open the door, say everything was okay, and shut the door again.

At approximately 7:25 p.m. on November 13, Madera County Sheriff's Deputy Swengel was dispatched to the Ronald McDonald House, in response to a call that a male subject was heard yelling at a female subject inside. Upon his arrival, he was directed to room 112. He knocked on the door, which was answered by defendant. The room

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[3] Lozano recalled receiving rug burns from defendant dragging her to the bathroom when someone knocked at the door. As of the time of trial, she was still receiving medical treatment for muscle spasms and back pain. Lozano admitted taking seizure medication and that she had had a seizure that day, around 5:00 p.m., because she and defendant had the fight. That was the only seizure she had that day, and she did not injure herself or believe she fell into anything while it was occurring. The seizure came and went for four or five hours, however, with a couple periods in which she had a physical reaction of shakiness and body jerking, followed by dizziness. In a request for a restraining order, she wrote that she had seizures and awoke in the hospital not knowing what happened. She also wrote that she had a seizure while taking a shower, and defendant put her back in the shower to wake her up. Lozano admitted that her seizures sometimes made her not remember things that happened and sometimes made her remember things that did not happen.

appeared to be in order, and Swengel asked defendant if there was anyone else in the room. Defendant said his girlfriend was there with him, but that she was in the shower. Swengel went to the bathroom door and could hear the shower running. He heard a female voice yell out that everything was okay. Swengel explained to defendant that he had responded because the sheriff's department had received a call about yelling and banging in the room. Defendant responded that he and his girlfriend were just having rough sex. Because there did not appear to be any type of disturbance, Swengel left.

Within minutes of Swengel leaving, Rodriguez heard the yelling start up again. The yelling continued off and on for 20 to 45 minutes. This time, Rodriguez heard muffled words and what sounded like stomping, people yelling, a male voice cussing, doors slamming, and a chair being moved.

The sheriff's department was called a second time. Swengel arrived at 9:01 p.m. Sergeant Clark was already on scene. From behind room 112, they could hear yelling and screaming, but could not make out what was being said. Although primarily a male voice was yelling, Swengel heard a female voice as well. It sounded like a verbal argument between a man and a woman.

Swengel and Clark went to the door. Clark heard a male voice say, "Call him, then. Call him, then." Swengel knocked on the door. When defendant opened it, Swengel could see Lozano lying on the floor at the back of the room. Swengel had defendant go outside with Clark and contacted Lozano. She was near the foot of one of the two beds in the room, lying on the floor on her side, with a cell phone near her head. She was wincing and complaining of back pain. Her left hand exhibited redness and swelling.

Swengel had an ambulance respond. He observed Lozano wincing in pain during the ambulance crew's evaluation. She would not answer questions, other than nodding yes or no. During the evaluation, Swengel saw a large raised knot on Lozano's forehead above her right eye. There were red marks around the bottom of her neck near the

collarbone. The swelling and redness on her left hand went from the knuckle on her index finger to the knuckle on her pinky finger. She had a scrape on her left elbow. On her right forearm near her wrist was what appeared to be a bite mark, although the skin was bruised, not pierced. She complained of pain in her left leg. Both knees had scrapes and bruises, and the entire outer left thigh area was one large red and purple bruise.

Swengel attempted to obtain information from Lozano regarding how she sustained the injuries. When Swengel asked her about the bruising on her hand and her back pain and if those were caused by defendant, she nodded yes. Lozano appeared to Swengel to be scared.[4] "[B]ased on [Swengel's] attempts to interview [Lozano]," he believed all the injuries were caused by defendant. Based on his prior experience investigating physical assault cases, he formed the opinion the injuries were caused during a domestic violence incident. He did not know for sure how the injuries were caused, however; and he noted Lozano was taking seizure medication.

Rodriguez had contact with Lozano while emergency personnel were there. She was lying on the floor. She was "[d]izzy," like she did not know where she was. Rodriguez witnessed the emergency personnel asking questions of Lozano. Lozano responded to the questions by moaning. Lozano's eyes were "kind of rolling around," there was red swelling around her face, and bruising on her upper leg.

Paramedic Daniel Bernhardt attended to Lozano. When he arrived with the ambulance, he found her lying on the floor next to a bed. She was slow to respond and complained of neck, abdominal, and leg pain. He noted a contusion to her forehead, and she complained that her cervical spine hurt. When he asked how she received her injuries, she responded that her boyfriend had kicked and punched her. Bernhardt asked for her medical history; she said she had a seizure disorder. She said she had lost

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[4] Later, when Swengel advised defendant that he was being arrested for domestic violence, defendant stated the marks on Lozano's neck were hickeys, and the couple was just wrestling around.

consciousness, although she did not say why. Bernhardt noted she had superficial, first degree burns; she said they were from a curling iron and a lighter, and that her boyfriend had burned her. During the evaluation, Lozano was quiet and hesitant to talk. She did not look like she wanted anyone touching her or being around her.

Bernhardt had treated assault patients before. Based on his experience, he opined Lozano's injuries were consistent with an assault. Although it was possible some of the injuries could have been caused by a seizure, he did not recall Lozano reporting that she had had a seizure.

Lozano was transported to Community Regional Medical Center in Fresno. She was treated in the emergency room by Dr. Gandara. Lozano was assigned an 11 on the Glasgow Coma Score, a mentation assessment tool. A normal score is 15; three is comatose. Although Lozano's eyes were open, she did not respond verbally. Gandara observed a contusion (a buildup of blood under the skin caused by some kind of impact) on her forehead; a large ecchymosis (bruise) on her left thigh; first degree burn marks (about the level of a sunburn) on the forearms; and multiple sites of traumatic ecchymosis. Lozano also had neck pain, but no fractures. Based on Gandara's medical experience as an emergency room doctor, the injuries — which were all fairly superficial — were consistent with a physical assault.[5]

Gandara was aware Lozano had a history of seizures, and it was possible she could have had one at some point that night. Lying on the ground appearing dizzy and "very confused" with eyes "kind of rolling around" would be consistent with a person who had had a seizure. While some of the injuries, such as the bloody knee and forehead contusion, could have been caused by a fall, other injuries were probably caused by an assault, and the distribution of injuries made it unlikely they were from a fall from a

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[5] Gandara explained that "superficial" was a combination of a medical term and a judgment term. "[S]uperficial" meant the injury only took "a part of one of the layers of the skin." Just because something was superficial did not mean it was insignificant.

seizure. Gandara had treated people who had had seizures; typical injuries were injuries to the tongue such as bite marks (none of which were documented on Lozano) and, if the person was standing and dropped, wounds to the head or extremities. In addition, Lozano's mental state did not appear to change in the way Gandara had observed in seizure patients. Based on her total evaluation of Lozano, Gandara did not see any indication of a seizure.

While defendant was in jail awaiting trial, he made telephone calls to his ex-girlfriend, Toni.[6] The first call took place on November 18. When Toni asked defendant what he had done, he said he "[b]eat up Tiff." Defendant told Toni to contact Lozano and instruct her to tell the district attorney that she was not going to testify and to drop the charges. Defendant claimed Lozano was talking to her ex-husband and had sexual relations with him at the hospital. Defendant expressed remorse.

The next call took place on November 19. In it, defendant asked if Lozano was healing, and said he felt like a coward for hitting her. He said Lozano had her ex-husband come down and she slept with him. Defendant fell asleep after taking "three little lines" of Vicodin, and when he woke, he caught her cleaning herself in the bathroom. She denied anything was wrong, but she was in there 20 or 25 minutes. When she came out, she denied cheating on him, and that was when they "got into it" and he started punching her in the leg and demanding that she tell him the truth. She still denied it, but when he told her to swear on her children's lives, she admitted being with her ex-husband.

In a call on December 28, defendant asked Toni to contact Lozano and tell her to tell the district attorney she was not willing to testify and wanted the charges dropped.

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6 Recordings of the calls were played for the jury.

In a call on May 3, 2013, defendant said the only way he would "beat" the case in trial was if Lozano did not testify, so he wanted Toni to "holler at her" and tell her that she was under investigation and if she testified, she would be made to incriminate herself.

II

DEFENSE EVIDENCE

Defendant testified that he and Lozano checked into a room at the Ronald McDonald house around 11:30 p.m. on November 12. The next morning, they went to visit their son in the hospital. They returned to their room and played with their little girl for a while. Afterward, defendant took Vicodin for his back. Lozano took her seizure medication, and several kinds of pain medication that had been prescribed to defendant. Defendant told her not to do that, because it usually made her seizures flare up.

Defendant and Lozano's daughter were napping when Lozano woke defendant and told him she was not feeling right, which was what she would say when she was going to have a seizure. They started arguing about her taking extra medication, because it gave her seizures. Also, they were not there to take care of their own problems, but rather were there for their son.

Defendant denied punching, kicking, or burning Lozano. The first time Swengel came, Lozano had already had a partial seizure. She had fallen once, and defendant had picked her up and put her on the bed. She said she wanted to take a shower, so he led her into the shower. She got her injuries from falling multiple times during her seizures.[7]

Defendant was evaluated by a registered nurse as part of the process of being booked into jail. Defendant did not have visible signs of trauma, bleeding, or wounds. He told Toni in one of the jail calls that he punched Lozano in the leg, but he only said

[7] Defendant saw two seizures and heard another one, when Lozano was in the shower.

that because Toni and Lozano disliked each other a lot, and he thought it would get Toni on his side and she would help him get bailed out.

DISCUSSION

I

ADMISSION OF SWENGEL'S OPINION CONCERNING LOZANO'S INJURIES

A. Background

During her direct examination, the prosecutor had Swengel identify and authenticate photographs taken of Lozano's injuries. This ensued:

> "Q [PROSECUTOR] Deputy Swengel, have you investigated domestic violence cases before?
>
> "A Yes.
>
> "Q Have you done — have you investigated cases of physical assault?
>
> "A Yes.
>
> "[DEFENSE COUNSEL]: Objection. Relevance.
>
> "THE COURT: Counsel, approach.
>
> "(Conference at the bench:)
>
> "THE COURT: What's the relevance of his experience of his domestic violence cases? [¶] … [¶]
>
> "[PROSECUTOR]: I was going to ask him if the injuries were consistent with a physical assault.
>
> "[DEFENSE COUNSEL]: Well, I think foundationally that's a problem, because there's also the issue of possible seizure that the victim might have had, so I don't think he can really testify how those injuries occurred.
>
> "THE COURT: You can cross-examine him about that. I'll allow her to go into that area."

The discussion then turned to the prosecutor's objection, on foundation and hearsay grounds, to Swengel testifying about seizure information. The court ruled defense counsel could cross-examine Swengel about other causes, "in other words, if the officer says, 'Based on upon [*sic*] my experience and training, it appears to be consistent with …' she can ask him, 'Was it also consistent with …'"

Back in the jury's presence, the following took place:

"Q [PROSECUTOR] I think I was asking you if you have investigated previous cases of physical assault.

"A [SWENGEL] Yes.

"Q And about how many would you say over your seven and a half years [as a deputy]?

"[DEFENSE COUNSEL]: Objection. Foundation.

"THE COURT: Overruled.

"THE WITNESS: It's hard to give an exact number, but on a daily basis, … we see probably one to two, sometimes more, a day. So one to two a day for seven and a half years.

"BY [PROSECUTOR]:

"Q Now, in this particular case, did you attempt to learn from the victim what had happened?

"A Yes, I did.

"Q And was the victim verbally responding to you?

"A No, she wasn't.

"Q How was she responding?

"A She would just nod yes or no.

"Q And did you ask any questions about how she sustained these injuries?

"A Yes, I did.

"Q And do you remember, like, what kind of questions you asked her?

"A Yes.

"Q What'd you ask her?

"A I asked her if the injuries were caused by sexual relations with Mr. Morales.

"Q And did she respond in any way?

"A She said no; nodded her head no.

"[DEFENSE COUNSEL]: Objection. Hearsay.

"THE COURT: Sustained.

"BY [PROSECUTOR]:

"Q Did … you attempt to obtain other information from her regarding how she sustained these injuries?

"A Yes, I did.

"Q And did you come to a conclusion as to how she sustained these injuries based on your attempts to interview her?

"A Yes, I did.

"Q And what were your conclusions that you made regarding how she sustained these injuries?

"A *I ... believed that the injuries were caused by Mr. Morales.*

"Q Now, based on your prior experience as a deputy investigating these cases, did you form an opinion about these types of injuries?

"A Yes.

"[DEFENSE COUNSEL]: Objection. Vague.

"THE COURT: Overruled.

"BY [PROSECUTOR]:

"Q And what was your opinion about these types of injuries?

"A *That these injuries were caused during a domestic violence incident*." (Italics added.)

B. Analysis

Defendant contends the italicized portions of Swengel's testimony constituted an irrelevant opinion as to defendant's guilt that should have been excluded. It is settled that "[a] witness may not express an opinion on a defendant's guilt. [Citations.] The reason for this rule is not because guilt is the ultimate issue of fact for the jury, as opinion testimony often goes to the ultimate issue. [Citations.] 'Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt.' [Citation.]" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 77.)

The trial court properly ruled Swengel could testify whether, in light of his prior experience, Lozano's injuries were consistent with a physical assault. This is so regardless of whether Swengel would be considered a lay witness or an expert witness on this point. (See, e.g., Evid. Code, §§ 800, 801; *People v. Rodriguez* (2014) 58 Cal.4th 587, 631; *People v. Clark* (1993) 5 Cal.4th 950, 1018, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see also *People v. Navarette* (2003) 30 Cal.4th 458, 493-494; *People v. Frederick* (2006) 142 Cal.App.4th 400, 412.) Fairly read, however, Swengel's testimony went beyond what was proper and was tantamount to expressing an opinion defendant was guilty. (See *People v. Jackson* (2000) 77 Cal.App.4th 574, 580 [§ 273.5 is not violated "unless the corporal injury results from a direct application of force on the victim by the defendant"]; see also *People v. Torres* (1995) 33 Cal.App.4th 37, 47-48.)

Defendant did not object on the ground the testimony constituted an irrelevant or otherwise improper opinion as to guilt, though. Therefore, even if the testimony was improper, his failure to object bars reversal. (Evid. Code, § 353, subd. (a); see *People v.*

Visciotti (1992) 2 Cal.4th 1, 51-52; *People v. Anderson* (1990) 52 Cal.3d 453, 478 [failure to object bars consideration of claim that police officer's opinion regarding truthfulness of suspect's confession is inadmissible].) While Evidence Code section 353 does not require any particular form of objection (*People v. Partida* (2005) 37 Cal.4th 428, 434-435), the California Supreme Court has consistently held "an '"objection must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility."' [Citation.] A general objection to the admission or exclusion of evidence, or one based on a different ground from that advanced at trial, does not preserve the claim for appeal." (*People v. Marks* (2003) 31 Cal.4th 197, 228.) Rather, the objection must "fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling. If the court overrules the objection, the objecting party may argue on appeal that the evidence should have been excluded for the reason asserted at trial, but it may not argue on appeal that the court should have excluded the evidence for a reason different from the one stated at trial. A party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct." (*People v. Partida*, *supra*, at p. 435.)

Here, defendant only raised a vagueness objection to the question that elicited the testimony about which he now complains. A timely and specific objection on the ground Swengel's testimony constituted an improper opinion as to guilt would have permitted the trial court to correct the problem, either by striking the offending testimony and having the prosecutor elicit only that Lozano's injuries were consistent with physical assault, or by admonishing the jury. (See *People v. Abel* (2012) 53 Cal.4th 891, 924.)

Defendant says if the issue was not preserved, then trial counsel provided ineffective assistance. The burden of proving ineffective assistance of counsel is on the

defendant. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) "To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings. [Citations.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003; see generally *Strickland v. Washington* (1984) 466 U.S. 668, 687-694.)

Defendant's protestations to the contrary notwithstanding, the evidence here was overwhelming as to both the substantive offense and the great bodily injury enhancement. This being the case, defendant has failed to meet his burden of establishing prejudice. (See *People v. Torres, supra*, 33 Cal.App.4th at p. 49.)[8]

II

PROSECUTORIAL MISCONDUCT

A. Background

In her summation, defense counsel asserted that both Lozano and defendant were "pretty much unbelievable" witnesses. As to Lozano, counsel told the jury: "You know,

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[8] We would reach the same conclusion were we to find the claim of error preserved for appeal. As defendant concedes, the appropriate standard of prejudice is that set out in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (See, e.g., *People v. DeHoyos* (2013) 57 Cal.4th 79, 130-131 [applying *Watson* standard to assertedly erroneous exclusion of lay opinion testimony]; *People v. Benavides* (2005) 35 Cal.4th 69, 90-91 [same re: assertedly irrelevant evidence]; *People v. Prieto* (2003) 30 Cal.4th 226, 247 [same re: erroneous admission of expert testimony].) "Under *Watson*, the erroneous admission of evidence … constitute[s] reversible error only if a reasonable probability exists that the jury would have reached a different result had this evidence been excluded. [Citations.]" (*People v. Whitson* (1998) 17 Cal.4th 229, 251.) No such probability exists here.

she came up here as the victim in the case, and very quiet, very unemotional about what happened, you know, very constrained demeanor, and she testified on direct that, you know, basically Mr. Morales is a villain.… [¶] But she was very unemotional the whole time, just, you know, not one drop of emotion. Which you think if you were really thinking back and remembering a savage beating where somebody was biting you and burning you with a lighter, I mean, that would cause something, that would cause some emotion, some tears to wallop [*sic*] behind the eyes, something, if this really happened. And you notice with her, that just never happened."

In her closing argument, the prosecutor discussed the testimony of uninterested witnesses, specifically Rodriguez, Swengel, and Bernhardt. This ensued:

> "[PROSECUTOR]: [Bernhardt] observed burns to [Lozano's] hands and arms. The — [Lozano] testified that the defendant burned her. Was [Lozano] the most verbal person from the stand? No, she isn't. Everybody deals with trauma differently. If everybody dealt with trauma the same thing [*sic*], I think my job would be a lot easier, because everybody would come in and they'd cry and they'd ball [*sic*], and they'd be upset.
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> "[DEFENSE COUNSEL]: Objection. Improper.
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> "THE COURT: Overruled.
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> "[PROSECUTOR]: People deal with trauma differently. Common sense tells us that, and the jury instruction asks you to use your common sense when evaluating the evidence."

B. <u>Analysis</u>

Defendant contends the prosecutor's quoted statements amounted to improper vouching for Lozano, and thus constituted prejudicial prosecutorial misconduct. The applicable legal principles are settled. "When a prosecutor's intemperate behavior is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process, the federal Constitution is violated. Prosecutorial misconduct that falls short of rendering the trial fundamentally unfair may still constitute misconduct under state law if it involves the use of deceptive or

reprehensible methods to persuade the trial court or the jury. [Citation.]" (*People v. Panah* (2005) 35 Cal.4th 395, 462.) Misconduct under state law is reversible only if "'"it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct"' [citation]." (*People v. Martinez* (2010) 47 Cal.4th 911, 955-956.) When the claim of misconduct is based on the prosecutor's comments before the jury, "'"the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion."' [Citation.]" (*People v. Thompson* (2010) 49 Cal.4th 79, 121.)

"'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion — and on the same ground — the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.' [Citation.]" (*People v. Nunez and Satele* (2013) 57 Cal.4th 1, 31.) However, forfeiture for failure to request an admonition will not be found where, as here, "the trial court immediately overruled the objection to the alleged misconduct, leaving defendant without an opportunity to request an admonition." (*People v. Panah*, *supra*, 35 Cal.4th at p. 462.)

When a defendant has preserved the issue, "the reviewing court must determine first whether misconduct has occurred, keeping in mind that '"[t]he prosecution has broad discretion to state its views as to what the evidence shows and what inferences may be drawn therefrom"' [citation] …. Second, if misconduct ha[s] occurred, we determine whether" it was prejudicial under the applicable standard. (*People v. Welch* (1999) 20 Cal.4th 701, 752-753.)

"A prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record. [Citations.] Nor is a prosecutor permitted to place the prestige of her office behind a witness by offering the impression that she has taken steps to assure a witness's truthfulness at trial. [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 971,

disapproved on another ground in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.) "The vice of such remarks is that they 'may be understood by jurors to permit them to avoid independently assessing witness credibility and to rely on the government's view of the evidence.' [Citation.] However, these limits do not preclude all comment regarding a witness's credibility." (*People v. Bonilla* (2007) 41 Cal.4th 313, 336; see *People v. Williams* (2013) 56 Cal.4th 165, 193.)

Viewing the challenged comments in the context of the argument as a whole, as we are required to do (*People v. Dennis* (1998) 17 Cal.4th 468, 522), we find no reasonable likelihood jurors would have construed the remarks as defendant contends.[9] The thrust of the argument was that jurors should use their common sense in determining whether Lozano's lack of emotion on the witness stand meant she was not telling the truth. Commonsense inferences are not misconduct. (See, e.g., *People v. Rich* (1988) 45 Cal.3d 1036, 1091; *People v. Kegler* (1987) 197 Cal.App.3d 72, 92.) There was no impropriety. (Compare *People v. Ochoa* (2001) 26 Cal.4th 398, 443 [prosecutorial argument witness was honest man, one of best witnesses that could be had in murder case, and kind of witness prosecutor wished to have more of, did not constitute misconduct], disapproved on another ground in *People v. Prieto, supra,* 30 Cal.4th at p. 263, fn. 14, with *People v. Alvarado* (2006) 141 Cal.App.4th 1577, 1583-1585 [prosecutor committed misconduct by stating she had taken oath as deputy district attorney not to prosecute case if she had any doubt crime occurred].) Because there was no improper vouching, the trial court did not abuse its discretion by overruling defendant's objection. (*People v. Alvarez* (1996) 14 Cal.4th 155, 213.)

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9 Jurors were instructed the attorneys' statements were not evidence.

III

RESPONSE TO JURY'S QUESTION

A. Background

Defendant attempted to establish that even if some of Lozano's injuries were consistent with an assault, others could have been caused by a fall, perhaps after a seizure. Defense counsel argued Lozano took too much medication, resulting in a seizure, then lied about the cause because she did not want law enforcement to know what she had done. Counsel pointed out the jury had to determine whether Lozano's injuries were caused by defendant or a seizure, and, in light of the great bodily injury enhancement, the level of any injuries caused by defendant.

Pursuant to CALCRIM No. 840, the jury was instructed:

> "The defendant is charged in Count 1 with inflicting an injury on the mother of his child that resulted in a traumatic conviction [*sic*], in violation of Penal Code Section 273.5 subdivision (a). To prove the defendant is guilty of this crime, the People must prove that, one, the defendant willfully inflicted a physical injury on the mother of his child; and, two, the injury inflicted by the defendant resulted in a traumatic condition.
>
> "Someone commits an act willfully when he or she does it willingly or on purpose. A traumatic condition is a wound or other bodily injury, whether minor or serious, caused by the direct application of physical force. A traumatic condition is the result of an injury if, one, the traumatic condition was the natural and probable consequence of the injury; two, the injury was a direct and substantial factor in causing the condition; and, three, the condition would not have happened without the injury.
>
> "A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. A substantial factor is more than a trivial or remote factor; however, it does not need to be the only factor that resulted in the traumatic condition."

Pursuant to CALCRIM No. 3163, the jury was further instructed:

"If you find the defendant guilty of the crime charged in Count 1 of inflicting injury on a fellow parent resulting in traumatic condition, then you must decide whether the People have proved the additional allegation that the defendant personally inflicted great bodily injury on Tiffany Lozano during the commission of that crime under circumstances involving domestic violence. Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

"'Domestic violence' means abuse committed against an adult who is a person with whom the defendant has had a child. 'Abuse' means intentionally or recklessly causing or attempting to cause bodily injury or placing another person in reasonable fear of eminent [*sic*] serious bodily injury to himself or herself or to someone else.

"The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved."

During deliberations, the jury sent out the following request (spelling and punctuation in original):

"1. What is the definition of tramatic

"2. Tramatic is a legal term & medical term. What is the difference?

"3. Can the jury take into consideration the total injuryes & consideration that tramatic"

The court and counsel discussed the questions outside the jury's presence. This took place:

"[THE COURT:] As to questions No. 1 and 2, I would be inclined to respond, 'Please see jury instruction No. 840, regarding what a traumatic condition is, wherein it says, "A traumatic condition is a wound or other bodily injury, whether minor or serious, caused by the direct application of physical force."'

"Answer No. 3, I would say, 'To the extent you find injuries are — or other bodily injury, whether minor or serious, caused by the direct application to physical force, you may consider one or more of the injuries.'

"[DEFENSE COUNSEL]: Okay. Submitted. [¶] … [¶]

"[PROSECUTOR]: I — the third question is a little odd the way it's worded, but I think what they're trying to say is can the jury take into consideration the — basically all the injuries and consider that traumatic?

"THE COURT: I think that's what they're asking.

"[PROSECUTOR]: And I think the jury can take into consideration all of the evidence of the injuries and determine what's traumatic, according to the definition given by the Court.

"[DEFENSE COUNSEL]: I think the question was very awkwardly phrased, so that sort of required an awkward answer, but I think — [¶] … [¶] … — the answer provided by the Court did a good job of just kind of guiding them to the jury instruction and didn't really — it seems like they're asking for an answer of some sort on that element, so I think that the Court's response is good in that it led them to that jury instruction, but didn't give them an answer, so to speak, a verdict.

"THE COURT: All right. Then I'll prepare that response, and we'll submit to the — ask the clerk to put on the request the jury's questions, as well as the Court's response at this time.

"(Pause in the proceedings.)

"THE COURT: Back on the record. So what I've done is listed questions 1 and 2 from to [*sic*] the jury. The answer to questions 1 and 2, this is the [written] response: Answer to questions 1 and 2, 'See Jury Instruction 840, wherein it describes traumatic condition as, quotation marks, a wound or other bodily injury, whether minor or serious, caused by the direct application of physical force.'

"Then I listed the third question. I responded to that: 'The jury may consider all of the evidence of the injuries and determine what is traumatic.'

"Any objections?

"[DEFENSE COUNSEL]: No objection — well, I do object because it's not as awkward as it was before, so I object to that.

"THE COURT: Want me to make it more awkward?

"[DEFENSE COUNSEL]: I'm kidding, Judge. No objection."

The written response was then sent in to the jury.

B. Analysis

Defendant now contends the court's response improperly instructed the jury how to consider the evidence. He says the trial court effectively coerced an adverse finding on both the substantive offense and the enhancement; hence, reversal is required.

As an initial matter, the Attorney General argues the issue was forfeited because defense counsel expressly approved the answers. Defendant says the issue is cognizable under section 1259, because the court was instructing the jury on the law.[10] Alternatively, he contends trial counsel was ineffective.

"'When the trial court responds to a question from a deliberating jury with a generally correct and pertinent statement of the law, a party who believes the court's response should be modified or clarified must make a contemporaneous request to that effect; failure to object to the trial court's wording or to request clarification results in forfeiture of the claim on appeal.' [Citations.]" (*People v. Boyce* (2014) 59 Cal.4th 672, 699.) Defendant contends that insofar as the jury's third question was concerned, the trial court's response was *not* correct. Nevertheless, forfeiture has been found when, as here, "the court makes clear its intended response and defense counsel, with ample opportunity to object, fails to do so. [Citation.]" (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1048.) In the present case, defense counsel not only failed to object, she approved of the court's proposed response for what clearly was a deliberate tactical purpose — she believed the trial court's response gave the jury guidance without directing them to a particular verdict. (See *People v. Beames* (2007) 40 Cal.4th 907, 927.) Thus, we are not convinced the issue has been preserved. In light of defendant's alternative claim of ineffective assistance of counsel, however, we will address the issue on the merits.

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10 Section 1259 permits an appellate court, upon an appeal taken by a defendant, to "review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."

"Section 1138 imposes upon the court a duty to provide the jury with information the jury desires on points of law. [Citation.]" (*People v. Smithey* (1999) 20 Cal.4th 936, 985, fn. omitted.)[11] "An appellate court applies the abuse of discretion standard of review to any decision by a trial court to instruct, or not to instruct, in its exercise of its supervision over a deliberating jury. [Citation.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 745-746.) If the original instructions are full and complete, the trial court need not elaborate on them, but rather may refer the jury back to them. (See, e.g., *People v. Moore* (1996) 44 Cal.App.4th 1323, 1331; *People v. Guilmette* (1991) 1 Cal.App.4th 1534, 1542.) Defendant does not claim the trial court erred by doing so in response to the first two questions asked by the jury here. (See *People v. Abrego* (1993) 21 Cal.App.4th 133, 138 [§ 273.5 requires injury, even if minor, from traumatic condition]; see also *People v. Gutierrez* (1985) 171 Cal.App.3d 944, 951-953 [discussing definition of "traumatic condition"].)

By telling jurors they could consider "'all of the evidence of the injuries and determine what is traumatic'" in response to the third question, however, defendant says the trial court effectively removed an issue from the jury's consideration and directed an adverse finding. "The independent or de novo standard of review is applicable in assessing whether instructions correctly state the law [citations] and also whether instructions effectively direct a finding adverse to a defendant by removing an issue from the jury's consideration [citations]." (*People v. Posey* (2004) 32 Cal.4th 193, 218.) Applying this standard in the present case, we conclude the trial court did not err.[12]

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11 Section 1138 states, in pertinent part: "After the jury have retired for deliberation, … if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel …."

12 Because the trial court did not err, it necessarily follows defense counsel was not ineffective for failing to object. "Trial counsel is not required to make futile objections, advance meritless arguments or undertake useless procedural challenges merely to create

"When a question shows the jury has focused on a particular issue, or is leaning in a certain direction, the court must not appear to be an advocate, either endorsing or redirecting the jury's inclination." (*People v. Moore*, *supra*, 44 Cal.App.4th at p. 1331.) "In assessing a claim of instructional error or ambiguity, we consider the instructions as a whole to determine whether there is a reasonable likelihood the jury was misled. [Citations.]" (*People v. Tate* (2010) 49 Cal.4th 635, 696.)

Defendant contends the jury's third question reflected a dispute among jurors concerning whether Lozano's injuries should be considered individually or collectively in deciding whether defendant caused injury amounting to a traumatic condition. Defendant argues jurors could consider the injuries either way; by telling them they could consider all the evidence of the injuries, he claims, the court urged jurors who may have concluded none of the injuries caused by defendant amounted to a traumatic condition, to abandon their position, while not also urging those leaning toward conviction to reconsider.

We see no reasonable likelihood jurors interpreted the court's response as defendant contends. The jury's question did not ask if the injuries could be considered individually, but whether they were allowed to take the total injuries into consideration. The court's answer neither directed them to forgo considering the injuries individually nor required them to consider the injuries as a whole, but rather told them they were permitted to consider all the evidence of the injuries and determine *what* was traumatic. This left it up to jurors to decide what injuries, if any, were caused by defendant as opposed to, for example, a fall during a seizure, and what injury or injuries, if any, that were caused by defendant resulted in a traumatic condition.[13] Under the circumstances,

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a record impregnable to assault for claimed inadequacy of counsel. [Citation.]" (*People v. Jones* (1979) 96 Cal.App.3d 820, 827.)

[13] CALCRIM No. 840 permitted jurors to convict only if an injury or injuries inflicted by defendant resulted in a traumatic condition. Similarly, CALCRIM No. 3163 permitted jurors to find true the great bodily injury allegation only if defendant personally inflicted such injury.

as defense counsel recognized, the court's response gave jurors guidance without leading them toward a verdict. There was no error.

IV

IMPOSITION OF HEALTH AND SAFETY CODE SECTION 1797.98A PENALTY ASSESSMENT

The probation officer's report recommended imposition, inter alia, of an $870 fine pursuant to section 273.5, subdivision (a). Of that amount, $40 was listed as "EMS per 1797.98a H&S." At sentencing, the trial court ordered defendant to pay the fine, with the components as listed in the probation officer's report. Defendant now contends that because Health and Safety Code section 1797.98a does not provide for a penalty assessment, the $40 was unauthorized and must be stricken. He is wrong.

Health and Safety Code section 1797.98a provides, in pertinent part:

> "(a) The fund provided for in this chapter shall be known as the Maddy Emergency Medical Services (EMS) Fund.
>
> "(b)(1) Each county may establish an emergency medical services fund, upon the adoption of a resolution by the board of supervisors. The moneys in the fund shall be available for the reimbursements required by this chapter.… [¶] … [¶]
>
> "(c) The source of the moneys in the fund shall be the penalty assessment made for this purpose, as provided in Section 76000 of the Government Code."

Government Code section 76000 provides for the imposition of penalty assessments on fines for criminal offenses in general. Section 76000.5 of the Government Code provides, in pertinent part:

> "(a)(1) Except as otherwise provided in this section, for purposes of supporting emergency medical services pursuant to Chapter 2.5 (commencing with Section 1797.98a) of Division 2.5 of the Health and Safety Code, in addition to the penalties set forth in [Government Code] Section 76000, the county board of supervisors may elect to levy an additional penalty in the amount of two dollars ($2) for every ten dollars

($10), or part of ten dollars ($10), upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses …. [¶] … [¶]

"(d) Funds collected pursuant to this section shall be deposited into the Maddy Emergency Medical Services (EMS) Fund established pursuant to Section 1797.98a of the Health and Safety Code."

As the Attorney General points out (and defendant does not dispute), the Madera County Board of Supervisors adopted the requisite resolution on May 6, 2008. It states in part: "**NOW, THEREFORE, BE IT RESOLVED** by the Board of Supervisors of the County of Madera, State of California, that: [¶] 1. The penalty of Two Dollars ($2.00) per Ten Dollars ($10.00) or fraction thereof be levied upon those fines, penalties, and forfeitures collected by the Madera County Superior Court as provided in Government Code section 76000.5, to be effective July 1, 2008." (Madera County Res. No. 2008-099.)[14] This being the case, the trial court was authorized — indeed, required — to impose the Health and Safety Code section 1797.98a penalty assessment. (*People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1528-1529.)

V

IMPOSITION OF THE SECTION 1203.097, SUBDIVISION (A)(5) FEE

The probation officer's report also recommended imposition of a $400 fee pursuant to section 1203.097, subdivision (a)(5).[15] The trial court imposed the fee as recommended. Defendant now contends the fee was legally unauthorized and must be stricken. The Attorney General agrees. So do we.

By its terms, section 1203.097, subdivision (a)(5)(A) provides for imposition of a fee in domestic violence cases in which the defendant is granted probation. It does not

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14 The resolution is viewable at <http://madera.granicus.com/MinutesViewer.php?view_id=13&clip_id=500> [as of Oct. 14, 2015].

15 Defendant incorrectly terms this a felony presentence report fee. As the Attorney General notes, the probation officer's report recommended, and the trial court imposed, a felony presentence report fee in the amount of $750.

apply when the person is sentenced, as defendant was, to prison. (*People v. Kirvin* (2014) 231 Cal.App.4th 1507, 1520.)

DISPOSITION

The $400 fee imposed pursuant to Penal Code section 1203.097, subdivision (a)(5) is stricken. As so modified, the judgment is affirmed. The trial court is directed to cause to be prepared an amended abstract of judgment showing said modification, and to have a certified copy of same transmitted to the appropriate authorities.

_____
DETJEN, J.

WE CONCUR:

_____
LEVY, Acting P.J.

_____
PEÑA, J.